U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 565-5330
(202) 565-5325 (FAX)

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Date Issued: February 21, 2000
Case No.: 1999 INA 062

In the Matter of:

LEE'S ACUPUNCTURE CLINIC/CHINESE HERBS, Employer,

on behalf of

HYOUNG HEE LIM, Alien.

Appearance: Y. H. Kim, Esq., of Los Angeles, California, for the Employer and Alien
Certifying Officer: R. M. Day, Region IX.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

ORDER OF REMAND

This case arose from a labor certification application that was filed on behalf of HYOUNG HEE LIM ("Alien") by LEE'S ACUPUNCTURE CLINIC/CHINESE HERBS ("Employer") under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act") and regulations promulgated thereunder, 20 CFR Part 656. [1] After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.

An alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa under § 212(a)(5) of the Act, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not

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[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and the written arguments of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the *Dictionary of Occupational Titles*, published by the Employment and Training Administration of the U. S. Department of Labor.

sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the Alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the state employment security agency and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

Application. On March 21, 1995, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Secretary I" in his Oriental Medicine Clinic/ Acupuncture-Herbal Medicine Center.[2] The state employment security agency ("state agency") classified the job as "Receptionist" under DOT Occupational Code No. 237.367-038, however.[3] The Employer's Form ETA 750A described the Job Duties as follows:

> To start new files when new patients arrive; To type information about patients into the file such as name, address, insurance carrier, allergies, etc.; To maintain and update existing files; To prepare charts for review by the doctor before the doctor's performing of examination or any kinds of treatments; To prepare correspondence to patients about

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[2] 201.362-030 **SECRETARY** (clerical) alternate titles: secretarial stenographer. Schedules appointments, gives information to callers, takes dictation, and otherwise relieves officials of clerical work and minor administrative and business detail: Reads and routes incoming mail. Locates and attaches appropriate file to correspondence to be answered by employer. Takes dictation in shorthand or by machine [STENOTYPE OPERATOR (clerical) 202.362-022] and transcribes notes on typewriter, or transcribes from voice recordings [TRANSCRIBING-MACHINE OPERATOR (clerical) 202.362-058] Composes and types routine correspondence. Files correspondence and other records. Answers telephone and gives information to callers or routes call to appropriate official and places outgoing calls. Schedules appointments for employer. Greets visitors, ascertains nature of business, and conducts visitors to employer or appropriate person. May not take dictation. May arrange travel schedule and reservations. May compile and type statistical reports. May oversee clerical workers. May keep personnel records [PERSONNEL CLERK (clerical) 209.362-026]. May record minutes of staff meetings. May make copies of correspondence or other printed matter, using copying or duplication machine. May prepare outgoing mail, using postage-metering machine. May prepare notes, correspondence, and reports, using work processor or computer terminal. *GOE: 01.03.01 STRENGTH: L GED: R4 M2 L4 SVP: 6 DLU:77.*

[3] 237.367-038 **RECEPTIONIST** (clerical) alternate titles: reception clerk. Receives callers at establishment, determines nature of business, and directs callers to destination: Obtains caller's name and arranges for appointment with person called upon. Directs caller to destination and records name, time of call, nature of business, and person called upon. May operate PBX telephone console to receive incoming messages. May type memos, correspondence, reports, and other documents. May work in office of medical practitioner or in other health care facility and be designated Outpatient Receptionist (medical Ser,) or Receptionist, Doctor's Office (medical ser.). May issue visitor's pass when required. May make future appointments and answer inquiries [INFORMATION CLERK (clerical) 237.367-022]. May perform variety of clerical duties [ADMINISTRATIVE CLERK (clerical) 219.362-010] and other duties pertinent to type of establishment. May collect and distribute mail and messages. *GOE: 07.04.04 STRENGTH: S GED: R3 M2 L3 SVP: 4 DLU: 88*

future appointments and answer any question regarding billing, appointment, etc. in Korean; To route mails; To greet patients.

AF 46, box 13. (Copied verbatim without change or correction.) The Employer stated no educational qualification, but required two years of experience in the Job Offered or in a Related Occupation the Employer described as "any secretarial/clerical work in any industry." The Other Special Requirements were, "Must speak, read & write Korean language." *Id*., boxes 14, 15. This was a forty hour a week job with no overtime at a monthly salary of $2,082.08. Hours were 9:00 A.M. to 6:00 P.M.[4] *Id*., boxes 10-12, 14. One U. S. worker applied for the job, but was not hired. AF 45.[5]

Notice of Findings. The initial Notice of Findings ("NOF"), issued March 18, 1997, found the Employer's Specific Vocational Preparation ("SVP") of two years to be excessive under 20 CFR § 656.21(b)(2), based on the reclassification of the position as Receptionist, which was found to be correct.[6] In addition, the NOF concluded that the requirement of fluency in Korean was an unduly restrictive foreign language requirement under 20 CFR § 656.21(b)(2)(i)(C). In the Employer's rebuttal of April 21, 1997, he successfully rebutted the

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[4] The basic work schedule was 10:00 A.M. to 03:00 p.m., but the weekdays when he would work were not given. AF 45, boxes 11, 12.

[5] A National of Korea, the Alien was born in 1964. She was living in the United States under a B-2 visa at the time of application. A B-2 visa is authorized by § 101(a)(15)(B) of the Act, 8 U.S.C. § 1101(a)(15). It is limited to an alien who has a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure. See 22 CFR §§ 40, 41. After graduating junior college with a major in craft arts in 1984, the Alien worked in Korea as a clerk in a manufacturing and wholesale retail business from 1988 to July 1991. While working as a clerk she answered telephone calls, scheduled appointments, checked the calendar for confirmation of appointments, organized files and documents, routed mails, prepared routine correspondence such as facsimile messages, notes memos, etc." She said she was unemployed from August 1991 to the date of application. AF 98-99.

[6] In Appendix C the DOT defined the Specific Vocational Preparation as the amount of elapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. "This training," Appendix C continued, "may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs." The following are the various levels of specific vocational preparation that the DOT fixed at Appendix C:

Level	**Preparation**
1	Short demonstration only.
2	Anything beyond short demonstration up to an including 1 month.
3	Over 1 month up to and including 3 months.
4	*Over 3 months up to and including 6 months.*
5	Over 6 months up to and including 1 year.
6	*Over 1 year up to and including 2 years.*
7	Over 2 years up to and including 4 years.
8	Over 4 years up to and including 10 years.
9	Over 10 years.

NOF finding that the foreign language requirement was unduly restrictive, in July 29, 1997, as thee second NOF omitted this deficiency. The second NOF cited 20 CFR § 656.21(b)(2) (i)(A), and said that Employer's requirement for two years' experience was unduly restrictive, as the SVP for the occupation of Receptionist under DOT No. 237.367-038 was 4, which required no experience in excess of six months. See footnotes 2, 3 and 6.

Recognizing that the issue was the reclassification of the occupation stated in the Form ETA 750A, the NOF adopted the state agency's rejection of the designation in the Employer's Application, and found two years' experience to be excessive for the position that Employer described in spite of his contention that the DOT Occupation description No. 201.362-030 for Secretary was more consistent with the job duties the Application stated. After noting a possible classification under DOT Job Description for a Medical Secretary under DOT No. 201.362-014, however, the NOF said that occupation required the performance of a wider range of skilled duties than either a secretary or a receptionist, as its job descripton included the use of medical terminology in taking dictation and typing reports.[7] The NOF concluded that the actual duties of the positiion described in the Application corresponded most closely to the DOT description of the work of a Receptionist. The NOF then directed the Employer to amend the Application by deleting the unduly restrictive requirement, or to prove that it was a business necessity.

Rebuttal. The Employer's second rebuttal, filed August 23, 1997, consisted of a letter by the attorney appearing for the Employer, a letter by Employer, a state agency document captioned "Prevailing Wage Request Form," and a chart comparing the essential duties of the position Employer described in his Application with the DOT occupation descriptions for a Secretary and a Receptionist. AF 09-15. The Employer conceded that the position described in the Job Offered was not that of a Medical Secretary. AF 10. The Employer argued that the DOT occupation descriptions of the work of a receptionist and a secretary did not preclude his hiring a worker classified as a secretary to work in his medical office. Counsel argued that the receptionist and secretary were distinguished by the work each they each performed, and noted that some of their duties overlapped, that the prevailing wage rates for the positions were different, and that the classification should be determined by the hourly wage he offered.

Final Determination. The CO's Final Determination of November 25, 1997, denied alien labor certification. AF 06-08. Citing 20 CFR § 656.21(b)(2), the CO explained that the Employer failed to establish that his hiring requirements for the position either were normally required for the performance of the job in the United States or arose from business necessity. After recapitulating the NOF, the rebuttal, the hiring requirements for the occupation. and the actual work duties enumerated in the Employer's application, the CO discussed the correct job classification. The CO took particular notice of the rebuttal statement by the Employer that (1) the duties regarding greeting patients and answering the telephone are secondary, and (2) he does

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[7] 201.362-014 **MEDICAL SECRETARY** (medical ser.) Performs secretarial duties, utilizing knowledge of medical terminology and hospital, clinic, or laboratory procedures: Takes dictation in shorthand or using dictaphone. Compiles and records medical charts, reports, and correspondence, using typewriter or word processor. Answers telephone, schedules appointments, and greets and directs visitors. Maintains files. *GOE: 07.01.03 STRENGTH: S GED: R4 M3 L4 SVP: 6 DLU: 86.*

not need a receptionist because his daughter in law currently was handling the work of greeting patients and answering the telephone without compensation. For the reasons stated at AF 08, the CO rejected the Employer's assertion that a material part of the work of the Job Offered was actually to be performed by another person and, presumably, would not be included among the duties of this position. AF 07, 15. The CO found this inconsistent, as the Employer's letter proposed that another person would greet patients, while the worker to be hired would start the new files, answer billing questions, make and adjust appointments, and greet patients, as represented in the description of job duties despite his characterization of the job as entirely clerical in nature. The CO further pointed out that this change vitiated the Employer's argument of the business necessity for fluency in the Korean language, which would require the revisiting of this issue since the Employer had previously argued that forty percent of this worker's time would be spent speaking Korean to answer telephone calls, schedule and confirm appointments, and get information from patients. Disregarding the fact that this proposal to amend the Application was late, the Employer's statement was not to be believed when considered in the context of the inconsistencies he introduced in opposing the reclassification of the position.

The crux of the issue was that the SVP of 6 for a secretary was materially greater than the SVP of 4 that the DOT stated for a receptionist. The CO said the Employer failed to establish that the hiring requirements for the job opportunity either were normally required for the performance of the job in the United States or arose from business necessity. As the position was correctly reclassified, the CO concluded that Employer's job requirements were unduly restrictive within the meaning of 20 CFR § 656.21(b)(2), and denied certification.

Appeal. By counsel's letter of December 13, 1997, the Employer appealed to BALCA, based on the reasons and arguments stated in his rebuttal of August 23, 1997. Now arguing that the reception duties of the position "[did] not constitute a majority of the time because forty percent is less than half," Employer reasoned that calling the reception tasks secondary was consistent with his statement that less than half of this worker's time would be spent on tasks requiring communication with the Korean speaking patients.

Discussion

Burden of proof. To establish entitlement to certification under the Act, Employer was required to sustain the burden of proof that its hiring requirements for the Job Offered were not unduly restrictive in violation of 20 CFR § 656.21b)(2). Noting that the CO's denial of alien labor certification was based on a finding that the Employer failed to sustain this burden of proof, the Panel observes that labor certification is a privilege that the Act expressly confers by giving favored treatment to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of the grant of this statutory privilege is indicated in 20 CFR § 656.2(b), which quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on certification

applicants.[8]

Employer's amendment. Employer's rebuttal and appeal attempted to minimize the job duties that would require the worker to communicate with the Employer's patients in the office and in telephone conversations. As the Final Determination noted, the CO's elimination of fluency in a foreign language as a reason for finding the job requirement unduly restrictive was based squarely on evidence that this worker would start new files when a new patient arrived, type into the file such information as the patient's name, address, insurance carrier, and allergies, all of which obviously required conversations with the patients in Korean. In addition, the Employer said this worker would use the Korean language to correspond with the patients about future appointments and answer any billing and appointment questions. The Employer's rebuttal statement indicated an intention to change his position by introducing as a new fact the disclosure that the patients were currently being greeted by a relative, and that he intended to change the job duties materially, in the expectation that this no longer would be regarded as a position for a receptionist, suggesting that the worker would not longer be required to communicate with the patients. This change of Employer's posture is material and cannot be ignored.

Further proceedings. Since the Employer now proposes to amend the Application by making a substantial change in the job description, the Application must be remanded to give the CO the opportunity to conduct such further proceedings as may be deemed appropriate. This is a proposed amendment to the Application that the CO must accept or reject. If the CO accepts the proposed amendment, the job must be readvertised in its amended form. In addition, the entire file must be reexamined in view of this realignment: (1) The record suggests that the CO never investigated Employer's job as a new position, whose duties were previously performed by some other person who was not identified in the record. (2) The Statement of Qualifications filed by the Alien indicates that she may not have the education or skills to perform such medical office work as the initial and the revised versions of the Job Duties described. (3) As the elimination of communication with the patients appears intended to insulate the proposed worker from any person who cannot speak anything but Korean, the sole reason preparing the medical records in the Korean language is the Employer's personal preference, based on the evidence of record at this time. Since forty percent or "less than half" of the worker's time will be spent

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[8] "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." The legislative history of the 1965 amendments to the Immigration and Nationality Act clearly shows that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334. Moreover, since the Employer applied for alien labor certification under this exception to the far reaching limits of the Immigration and Nationality Act on immigration into the United States, which Congress adopted in the 1965 amendments, the Panel's deliberations concerning the award of alien labor certification are subject to the well-established common law principle that, "Statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption." 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

writing Korean pursuant to his amended version of the job duties, the Employer's business necessity for the use of this foreign language must again be determined. On the other hand, since forty percent or "less than half" of the worker's time would be spent writing Korean pursuant to the amended version of the job duties, the Employer's business necessity for the use of this foreign language must again be determined based on his amended Application. (4) Finally, because the Employer's appellate argument admitted that forty percent of the job duties have been reassigned to another worker since the Application was filed and will no longer be performed by this worker, the CO must reexamine the job as defined by the amended Application in order to determine whether it now can furnish full time employment.

Accordingly, the following order will enter.

ORDER

1. The Certifying Officer's denial of labor certification is hereby vacated.

2. This matter is remanded to the Certifying Officer to permit the determination of the Employer's request for permission to appeal the Application at this time, and to conduct such further proceedings as may be deemed appropriate.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case No.: 1999 INA 062
LEE'S ACUPUNCTURE CLINIC/CHINESE HERBS, Employer,
HYOUNG HEE LIM, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis			
Huddleston			

Thank you,

Judge Neusner
Date: May 21, 1999